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No. 06-1431

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARIZONA, CONNECTICUT, IOWA, ILLINOIS, MARYLAND, MASSACHUSETTS, MISSOURI, NEVADA, NEW JERSEY, OHIO, OREGON, VERMONT, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does 42 U.S.C. § 1981 provide redress to persons who have suffered retaliation as a result of complaining about race discrimination?

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INTEREST OF AMICI CURIAE

At stake in this case is the right of citizens to be protected from reprisal when they report unlawful race discrimination that violates 42 U.S.C. § 1981. Section 1981, originally enacted as part of the Reconstruction-era Civil Rights Act of 1866, prohibits the "impairment" of the rights of all citizens to "make and enforce contacts," irrespective of race. In this case, respondent, an African-American employee of a restaurant operated by petitioner, alleged that he was fired because he complained about his supervisor's allegedly racially discriminatory behavior.

Amici States are dedicated to fostering a culture in which citizens feel free to report violations of the civil rights laws to the appropriate authorities. Effective legal protection against retaliation is an integral part of such a culture. The States therefore have a profound interest in ensuring that § 1981 provides protection to those who report discrimination that violates the statute's promise of equal treatment in contractual relationships, without fear of retaliation.

As the chief law enforcement officers of the respective States, the amici attorneys general are also committed to the proper interpretation of civil rights laws, consistent with "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989). In this connection, notwithstanding the existence of state antidiscrimination statutes, the States frequently rely on federal statutes such as § 1981 when acting as

parens patriae. In many cases, § 1981 is the only federal cause of action available to provide redress for private racial discrimination. For example, unlike Title VII of the Civil Rights Act of 1964, § 1981 covers independent contractors and employees of firms with fewer than fifteen employees. The amici States therefore have a strong interest in ensuring that courts give real content to § 1981's guarantee of equal treatment in contractual relationships, including effective protection against retaliation.

SUMMARY OF ARGUMENT

Section 1981 provides redress to parties to contracts, including employees, who suffer retaliation because they complained about race discrimination.

The text of § 1981 broadly prohibits the "impairment" of the right to "enjoy[] . . . all benefits, privileges, terms, and conditions of the contractual relationship" on an equal footing with "white citizens." An employer's retaliation against an employee who complains about race discrimination falls squarely within the terms of the statute, because such reprisal impairs the employee's right to equal treatment in contractual relationships. Furthermore, this impairment is based on race because, as this Court has recognized, retaliation is a form of intentional discrimination, and retaliating against persons because they have complained about race discrimination is itself discrimination "based on race."

While the text of § 1981 does not include the word "retaliate," no such magic words are required for the

statute to be fairly construed as providing redress for retaliation. Petitioner's contrary argument, which emphasizes the explicit retaliation provisions in various modern antidiscrimination statutes, overlooks the fundamental difference in text and structure between such statutes and the Reconstruction-era Civil Rights Act from which § 1981 derives. Because the text of § 1981 indicates that its long-recognized cause of action encompasses claims alleging retaliation, this reading of the statute does not involve "implying" any new cause of action or "reading into" the text of the statute any novel rights.

This Court's longstanding precedent, coupled with the historical context surrounding the enactment of § 1981, further compel the conclusion that the broad terms of § 1981 encompass a claim for retaliation. In particular, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), establishes that obstruction of employees' efforts to obtain redress for discrimination is actionable under § 1981, even when the obstruction is motivated not by the employees' race but rather by the racial nature of their complaint.

Reading § 1981 to provide redress for retaliation will not cause plaintiffs to circumvent the strictures of Title VII, because proceeding under Title VII offers plaintiffs the advantages of the U.S. Equal Employment Opportunity Commission's administrative process. There thus is no reason to believe that plaintiffs alleging retaliation will generally bypass Title VII in favor of § 1981.

ARGUMENT

I. SECTION 1981'S CAUSE OF ACTION ENCOMPASSES CLAIMS OF RETALIATION FOR COMPLAINTS ABOUT RACE DISCRIMINATION

A. Retaliation "Impairs" an Individual's Ability to "Make and Enforce Contracts" Within the Meaning of § 1981.

Claims of retaliation for complaints about race discrimination fall within the broad terms of § 1981, because an employer that retaliates against an employee who has complained about race discrimination has "impaired" that employee's ability to "make and enforce contracts" — which includes the right to "enjoy[] . . . all benefits . . . of the contractual relationship" — on an equal footing with "white citizens."

1. The current text of § 1981(a), which is essentially the same as its precursor in the Civil Rights Act of 1866, states in relevant part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."[1]

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1. The current text of § 1981 provides in full:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal

(Cont'd)

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this Court held that the first aspect of § 1981(a)'s guarantee of equal rights ("the same right . . . to make . . . contracts") extended only to the formation of a contract, but not to "postformation conduct" such as workplace harassment or a discriminatory termination. *Id.* at 177.[2] "In 1991, however, Congress responded to

(Cont'd)

> benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

2. The *Patterson* Court held that the second aspect of the equal rights guarantee ("the same right . . . to . . . enforce contracts") embraced "protection of a legal process, and of a right of access to legal process, that will address and resolve contract-

(Cont'd)

Patterson by adding a new subsection to § 1981 that defines the term 'make and enforce contracts' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 373 (2004) (quoting 42 U.S.C. § 1981(b)). This legislative amendment "overturned *Patterson*" and "enlarged the category of conduct that is subject to § 1981 liability." *Jones*, 541 U.S. at 383 (citation and quotation marks omitted).

2. The 1991 amendment also added to the statute a new subsection (c), not discussed by petitioner or its amici. Subsection (c) provides, under the heading "Protection against impairment," that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). Subsection (c) was intended to codify this Court's holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that § 1981 covers both private and governmental discrimination. *See* H.R. Rep. No. 102-40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731. And because Congress was at the same time expanding the conduct prohibited by the statute, Congress chose the comprehensive term "impairment" ("[t]he rights protected by this section are protected against impairment") to describe the broad scope of the conduct prohibited by subsection (b),

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(Cont'd)

law claims without regard to race." *Patterson*, 491 U.S. at 177. The Court specifically noted that this right also extended to "wholly private efforts to impede access to the courts or *obstruct* nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* (emphasis altered).

including the postformation conduct previously excluded by *Patterson*.[3]

The statute's expansive language commands a liberal interpretation. As this Court admonished in the context of § 1981's companion provision, 42 U.S.C. § 1982, which is likewise derived from § 1 of the Civil Rights Act of 1866, "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, . . . from which § 1982 was derived." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Or, as the Court noted in discussing a different statute in *Salinas v. United States*, 522 U.S. 52, 56 (1997), the "enactment's expansive, unqualified language" militates against a "narrowing construction." This basic principle of statutory construction applies here because the Civil Rights Acts are "characterized by broadly inclusive language. They do not limit who may bring suit, [and] do not limit the cause of action to a circumscribed set of facts . . . ." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (noting the "broad terms" of the 1866 Act); *Jones v. Alfred H. Mayer Co.*,

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3. As the court below recognized, the report of the House Committee on Education and Labor also indicates that the committee understood that "retaliation" would be covered by the 1991 revisions to the statute. *See* H.R. Rep. No. 102-40(I), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630 ("the list set forth in [§ 1981(b)] is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.") (emphasis added).

392 U.S. 409, 437 (1968) (according § 1981 "a sweep as broad as its language") (citation and quotation marks omitted).

The text of § 1981 neither "limit[s] the cause of action" provided thereunder "to a circumscribed set of facts," *Burnett*, 468 U.S. at 50, nor limits the cause of action to a specific legal theory (such as one for "discrimination" rather than "retaliation"). This is not surprising in a Reconstruction-era statute that, in contrast with more detailed modern legislation like Title VII, provides a sweeping definition of a right to equal treatment and broadly proscribes the "impairment" of that right. That being so, the most natural construction of the statute's expansive language encompasses retaliation claims. An employer that retaliates against an employee who complains that he is a victim of race discrimination in the employment relationship "impair[s]" that employee's ability to "make and enforce contracts" — *i.e.*, the right to "enjoy[] . . . all benefits . . . of the contractual relationship" — on an equal footing with "white persons," and such impairment therefore violates § 1981. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999) ("[t]he dictionary definition of 'impair' is 'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'") (quoting *Black's Law Dictionary* 752 (6th ed. 1990)); *Webster's New International Dictionary* 1131 (3d ed. 1981) (defining "impair" as "to make worse: diminish in quantity, value, excellence, or strength" and to "do harm to").

Retaliating against someone because he or she has complained about race discrimination (particularly

where, as here, the victim of the retaliation was also a victim of the alleged initial discrimination) assuredly diminishes, and thus impairs, that person's right to enjoy all the incidents of the contractual relationship irrespective of race. *Cf. Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (Posner, J.) (discussing pre-1991 text of § 1981). Such a violation is actionable under the statute because "[s]ection 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination *impairs* an existing contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (emphasis added).

3. While the "impairment" of the contractual relationship must of course be related to race, it is settled that retaliation is a species of discrimination. As this Court recently made clear in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005), retaliation against a person because that person has complained about unlawful discrimination is simply "another form" of "intentional" and unlawful discrimination. Although the *Jackson* Court was addressing sex (rather than race) discrimination in the context of liability under Title IX (rather than § 1981), its reasoning applies with full force here. "[R]etaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 173-74.

Even apart from *Jackson*, the argument that § 1981 excludes retaliation claims does not respect the statute's expansive language prohibiting the "impairment" of the right to equal treatment in contractual relationships

irrespective of race. While the initial discriminatory act must of course be "based on race," *see Patterson*, 491 U.S. at 176-77; *Domino's Pizza*, 546 U.S. at 474, nothing in the text of § 1981 suggests that the concomitant act of retaliation must itself be motivated by the *complainant's* race. It is sufficient that the retaliation responds to a complaint of race discrimination, and in that sense, is "based on race." This establishes a nexus between the subject matter of the complaint (race discrimination) and the retaliatory act that flows from the nature of the complaint (i.e., an act of retaliation "based on" a prior complaint *about race discrimination*). Whether or not other statutes addressing discrimination also encompass retaliation, the broad and general language of § 1981 does so.

4. Petitioner and its amici are wrong to suggest that construing § 1981 to encompass a claim of retaliation for complaints about race discrimination necessarily involves "implying" a non-existent right (Brief of Amicus Curiae the Chamber of Commerce of the United States ("Chamber of Commerce Amicus Br.") at 17), "creating a cause of action . . . out of whole cloth" (Pet. Br. at 42), or "read[ing] into" the text of the statute a protection that does not exist (Brief of Amici Curiae the Equal Employment Advisory Council and National Federation of Independent Business Legal Foundation ("EEAC Amicus Br.") at 7). To portray the issue in this manner is merely to assume the answer to the very question posed: whether § 1981, fairly construed, provides redress for retaliation based on an individual's complaints about

race discrimination.[4] This mistaken view appears to stem from the erroneous assumption that there must be distinct causes of action for "discrimination" and "retaliation," and that the lack of the word "retaliate" or its equivalent in § 1981 means that such a claim is not cognizable under the statute. *See, e.g.*, Pet. Br. at 12 (noting that "Congress never used the word 'retaliation' or a derivative thereof in its text").

Whatever force such an argument might have in the context of a statute like Title VII that expressly addresses discrimination and retaliation in separate statutory sections (*compare* 42 U.S.C. § 2000e-2(a), *with* 42 U.S.C. § 2000e-3(a)), it makes no sense in the context of § 1981. Section 1981, which speaks broadly of the right to equal treatment in all aspects of the contractual relationship and proscribes the "impairment" of that right, does not by its terms limit itself to a cause of action denominated "discrimination." While the text of § 1981 does not include the word "retaliate," to accord talismanic significance to that fact is to adopt a "'magic

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4. Petitioner's claim finds no support in Supreme Court cases generally characterizing the private cause of action under § 1981 (like the cause of action under its companion provision, § 1982) as an "implied" remedy. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690, 698 nn.13, 23 (1979) (citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), as a case in which the Court "impl[ied]" a cause of action under § 1982). Nothing in those cases suggests that a claim for retaliation is distinctively nontextual or requires a special act of "implication" beyond the original and unchallenged judicial determination that an implied private right of action exists to enforce the rights expressly created by §§ 1981 and 1982. A claim for retaliation stands on the same footing as a claim for any other conduct prohibited by §§ 1981 and 1982.

words' jurisprudence that departs from ordinary rules of English usage." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 265 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy and O'Connor, JJ.); *cf. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (noting that the Court has "never required any particular magic words" and its task is to "enforce the 'clear and manifest purpose of Congress.'") (citation omitted).

Such a wooden approach to statutory construction would be particularly incongruous when applied to a Reconstruction-era statute that is phrased more in the manner of a broad constitutional norm. In that respect, § 1981 is quite different from the detailed statutory schemes found in many twentieth-century antidiscrimination laws, including Title VII. *Cf. Jackson*, 544 U.S. at 175 (noting that "Title VII . . . is a vastly different statute from Title IX. . . . Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition," while "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of the statute."). For this reason, this is an even easier case than *Jackson*, which addressed Title IX's proscription of "discrimination" on the basis of sex. Title IX, while not as detailed as Title VII, still reflects a modern and specific style of statutory drafting. Section 1981, by contrast, is cast in more sweeping terms. It would therefore be inappropriate to look for the kinds of specifics found in a statute like Title VII when interpreting § 1981.

B. This Court's Precedents Confirm That § 1981 Embraces Claims for Retaliation.

Reading § 1981 to provide redress for retaliation is further supported by two decisions of this Court. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), a group of black employees asserted claims of race discrimination, under § 1981 and Title VII, against both their employer and their unions as collective bargaining agents. In a portion of Justice White's opinion joined by five Members of the Court, the Court held that the unions were liable under § 1981 for refusing to process grievances that charged the employer with race discrimination. *Id.* at 668-69. Contending that "the employer would 'get its back up' if racial bias was charged," the unions had effectively "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks." *Id.* at 668.

The *Lukens* Court agreed that such conduct "intentionally discriminated against blacks seeking a remedy" and held that § 1981, like Title VII, was violated where a union rejected grievances alleging race discrimination "solely because the claims assert racial bias and would be very troublesome to process." *Id.* at 669. Significantly, the Court reached this conclusion even though "there was no suggestion . . . that the Unions held any racial animus against or denigrated blacks generally," *id.* at 668, and the refusal to process grievances apparently stemmed from the nature of the grievance (as about race discrimination) rather than from the race of the complainant. *See id.* at 669 (quoting with approval the district court's statement that "'[a] union

which intentionally avoids asserting discrimination claims . . . is liable under . . . § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.'"); *see also id.* at 681 (Powell, J., concurring in part and dissenting in part) ("[n]either of the courts below specifically found that the Unions were motivated by racial animus").

Accordingly, *Lukens* demonstrates that, even under the narrower (pre-1991) text of § 1981, obstruction of an employee's efforts to obtain redress for race discrimination is actionable under § 1981, and that this is so notwithstanding the fact that the obstruction is *not* motivated by the employee's race, but rather by the racial nature of the employee's complaint. Similarly, an employer's retaliation for an employee's complaints about race discrimination constitutes obstruction based on the racial nature of the employee's complaint.[5] Indeed, given that such obstruction is actionable under § 1981 even when it takes the form of passive conduct (such as the deliberate failure to respond to the grievances at issue in *Lukens*), it surely must be actionable where, as here, it also involves an affirmative act of alleged retaliation — termination of the employee.

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), further buttresses the conclusion that § 1981's cause of action for discriminatory impairments of contractual relationships encompasses claims for retaliation. There,

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5. Like the unions' failure to process employee grievances about discrimination in *Lukens*, petitioner's agent in this case (district manager William Christensen) apparently failed to conduct any investigation of respondent's complaints about race discrimination. J.A. 119.

the Court held that Sullivan, a white property owner, could sue for retaliation under § 1981's companion provision (§ 1982) even though his underlying complaint was that Freeman, an African-American person, had been subjected to unlawful discrimination. Sullivan was expelled from a corporation that operated recreational facilities for the local community in retaliation for his opposition to the corporation's racially exclusive leasing policy. The Court concluded that Sullivan could sue under § 1982 for his "expulsion for the advocacy of Freeman's cause" because, if that sanction could lawfully be imposed, "then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982" and "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237.

Although *Sullivan* addressed § 1982 rather than § 1981, its holding is no less applicable here. *See Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973) (noting in the context of discrimination claims under § 1981 and § 1982 that, "[i]n light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently") (footnote omitted); *accord Runyon v. McCrary*, 427 U.S. 160, 171 (1976).

Taken together, these precedents, along with *Jackson*, confirm that retaliation for complaints about race discrimination is but a species of intentional discrimination, and that it "impair[s]" the rights secured by § 1981 to enjoy all the benefits of the contractual relationship irrespective of race. Obstructing employees' efforts to obtain redress for discrimination violates

§ 1981, and permitting unchecked retaliation against efforts to vindicate the rights protected by the Act of 1866 "would give impetus" to the very discrimination that the Act was designed to forbid, *Sullivan*, 396 U.S. at 237.

C. Excluding Retaliation Claims from § 1981 Would Subvert the Goals of Congress in Enacting, and Expanding the Scope of, the Statute.

Not only do the text and precedent compel the conclusion that the broad terms of § 1981 cover claims for retaliation, but a contrary reading would subvert the purposes of the legislation. The context surrounding the initial enactment of § 1981, amplified by Congress' explicit declarations of purpose in the legislation that enlarged the statute's reach in 1991, confirm Congress' broad remedial goal in enacting the statute and its intention to eradicate discrimination in contractual relationships.

1. This Court has previously emphasized Congress' intentions during the legislative debates over the enactment of § 1981's source, § 1 of the Civil Rights Act of 1866, to give that statute real content and practical effect. As the Court has described these debates, while "much was said" in both the House and the Senate about "eliminating the infamous Black Codes" that subjected recently freed slaves to multiple disabilities, "like the Senate, the House was moved by a larger objective — that of giving *real content* to the freedom guaranteed by the Thirteenth Amendment." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968) (emphasis added).

For example, Representative Thayer of Pennsylvania noted that the bill that was to become the 1866 Act had the object of "carry[ing] out and guarant[eeing] the reality of [the Thirteenth Amendment]. It [was] to give to it practical effect and force. It [was] to prevent that great measure from remaining a dead letter upon the constitutional page of this country." *Id.* at 433-34 (quoting Cong. Globe, 39th Cong., 1st Sess. 1151).

Consistent with the broad remedial goal and pragmatic focus of the original statute, Congress sought to broaden the scope of § 1981 in 1991. In particular, Congress explicitly stated its findings in Public Law 102-166 that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace" and "legislation is necessary to provide additional protections against unlawful discrimination in employment." Pub. L. 102-166, § 2, 105 Stat. 1071. In a similar vein, the law states that among the purposes of the 1991 amendments were "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.*, § 3; *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 309 (1994).

These statements by the legislative branch manifest an unequivocal intent to buttress the remedies previously recognized under § 1981, and to protect broadly against the impairment of contractual relationships, including employment, on the basis of race.

2. As Justice Marshall observed long before the passage of the Civil Rights Act, "[s]tatutes . . . are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820); *see also N. Star Steel Co. v. Thomas*, 515 U.S. 29, 37 (1995) (Scalia, J., concurring in judgment) (considering, where Congress had not prescribed a limitations period to govern a cause of action, whether application of a state statute of limitations "would frustrate the purposes of the federal enactment"). Here, exclusion of retaliation claims from the broad compass of § 1981 would thwart the purpose of the statute.[6] Such a reading should therefore be avoided.

The promise of equal treatment in the context of contractual relationships would be nullified if employers could retaliate with impunity against employees who lodge grievances about race discrimination. Without an apparatus to redress and deter retaliation, not only would the core antidiscrimination imperative of § 1981 become a dead letter in the individual case, but at a more fundamental level, the very system would "unravel," as this Court noted in the analogous context of sex discrimination in violation of Title IX. *See Jackson*, 544 U.S. at 180 ("Reporting incidents of discrimination is integral to Title IX enforcement and would be

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6. Disregard of Congress' purpose was no more sanctioned around the time of the enactment of the Civil Rights Act in 1866 than it is now. *See, e.g., Anthony v. Butler*, 38 U.S. 423, 426 (1839) (where the "statute [is] remedial in its character, and [is] intended by the legislature to remedy the mischief occasioned by the rule of law as expounded by the Courts," "[t]he construction of such a statute should be liberal, to prevent the mischief").

discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."). This unraveling effect would be particularly pronounced in the context of racial harassment at the workplace and racially hostile work environments, which are forms of discrimination that are often insidious and difficult to detect. Accordingly, it is particularly important for employees, who are uniquely well positioned to identify and report such discrimination, to feel free to report it to their employer. Individuals — particularly those who are not protected by other statutes such as Title VII — will likely be chilled into silence by a regime that tolerates retaliation. Indeed, a significant body of social science literature confirms that "the threat of retaliation functions as a powerful silencer" and the "understanding of retaliation that emerges from this literature demonstrates the need for strong legal protection from retaliation against persons who identify and challenge inequality." Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 24-25, 64 & n.75 (2005) (citing social science data); *see also* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801, 818 (2006) (noting "[e]xperimental research" substantiating fears expressed by those alleging discrimination that they will suffer retaliation).

Absent meaningful protection against reprisal, unlawful acts of discrimination will never come to light. And absent an effective deterrent mechanism in the form of liability for retaliation in the many cases where Title VII does not provide relief, employers and other parties to contracts who engage in unlawful

discrimination will have no incentive to change their ways. Quite the opposite, as the opinion below pointed out: "To hold that section 1981 allows unfettered retaliation . . . would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981." J.A. 144.

Reversal of the lower court's conclusion that § 1981 provides redress for retaliation would undermine the robust remedial scheme that § 1981 was designed to create. Without such protection, the statute would become in many cases little more than a precatory statement of a lofty ideal, but an ideal without real content. Such a reading of the statute — so fundamentally at odds with its purpose — cannot be correct.

II. SECTION 1981 SHOULD NOT BE CURTAILED BECAUSE OF OVERLAP WITH TITLE VII

Petitioner and its amici are mistaken in suggesting that the court of appeals' reading of the statute will cause plaintiffs to circumvent the strictures of Title VII — including, in particular, its statute of limitations and requirement to exhaust administrative remedies before filing suit in court — and that § 1981 should be curtailed to avoid that possibility. Pet. at 16; EEAC Amicus Br. at 16-17; Chamber of Commerce Amicus Br. at 21. First, as this Court has repeatedly recognized, Congress specifically intended to create partially overlapping schemes of liability under § 1981 and Title VII, and the coexistence of those complementary schemes is firmly embedded in our legal tradition. Second, the lower

court's reading of § 1981 does not create any conflict between § 1981 and Title VII in any event, because the two regimes are not coextensive. Third, because Title VII affords plaintiffs many advantages, there is no reason to believe — and no evidence to suggest — that plaintiffs will generally bypass Title VII in favor of § 1981.

A. Congress Intended to Create Partially Overlapping Schemes of Liability Under § 1981 and Title VII.

Petitioner and its amici urge the Court to construe § 1981 narrowly to foreclose claims for retaliation based on the policy argument that the lower court's contrary reading "dilutes Title VII" (Pet. Br. at 39), improperly allows plaintiffs to "bypass" Title VII's enforcement mechanism (EEAC Amicus Br. at 17) and "undermine[s]" Title VII's conciliation process (Chamber of Commerce Amicus Br. at 24). Unsurprisingly, these and similar arguments have been made numerous times before and, just as many times, they have been rejected by this Court.

Johnson provides a paradigmatic example of the Court's repeated recognition and approval of the partially overlapping schemes of liability that the legislative branch has deliberately created. There, the Court held that "the remedies available under Title VII and § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent," notwithstanding the benefits of the

conciliation procedure contemplated by Title VII. 421 U.S. at 461. As the Court explained:

> Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.

Id. at 459 (citation omitted). Indeed, the *Johnson* Court noted evidence of Congress' intention that the remedial schemes under § 1981 and Title VII exist side by side and "augment each other" in such a way that they "are not mutually exclusive." *Id.* at 459 (quoting H.R. Rep. No. 92-238, at 19 (1971), 1972 U.S.C.C.A.N. 2137, 2154). The Court, moreover, pointed out that, in considering the Equal Employment Opportunity Act of 1972, the Senate had specifically rejected an amendment that would have deprived a claimant of any right to sue under § 1981 in lieu of an exclusive remedy under Title VII and the Equal Pay Act. *Id.* at 459 (citing 118 Cong. Rec. 3371-73 (1972)); *see also Runyon*, 427 U.S. at 175 n.11.

In *Patterson*, the Court again was asked to curtail the reach of § 1981 based on the argument that the statute "frustrates the objectives of Title VII" when applied to contracts of employment and "undermines Congress' detailed efforts in Title VII to resolve disputes . . . through conciliation rather than litigation as an initial matter." *Patterson*, 491 U.S. at 173-74. Rejecting these calls, the *Patterson* Court noted that "there is some necessary overlap between Title VII and § 1981, and . . .

where the statutes do in fact overlap we are not at liberty 'to infer any positive preference for one over the other.'" *Id.* at 181 (quoting *Johnson*, 421 U.S. at 461).[7]

These cases foreclose petitioner's argument that § 1981 must be read narrowly because, in effect, deference to Title VII's administrative scheme "trumps" the remedies provided by § 1981. Accordingly, even if the lower court's reading of § 1981 did undermine Title VII's regime (which, as shown below, it did not), petitioner's argument should be rejected for two reasons. First, *stare decisis* compels adherence to the longstanding precedent, firmly embedded in our legal culture, establishing that any overlap between the two schemes is neither problematic nor inadvertent. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citing "'wide acceptance in the legal culture'" as a reason to avoid overruling precedents) (quoting *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting)). Indeed, the Court in *Patterson* noted that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at

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7. Although the Court went on to note its "reluctan[ce] . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute," *Patterson*, 491 U.S. at 181, that statement provides no support for a limiting construction of § 1981 here because, after *Patterson* — and long after the passage of Title VII in the Civil Rights Act of 1964 — Congress deliberately expanded the reach of § 1981 in the amendments to the statute in 1991. *See* pp. 5-6, 17, *supra*.

172-73. And, second, the question of whether or not the partial overlap reflects sound policy is ultimately an issue for Congress, not for the courts.

B. Reading § 1981 To Encompass Claims for Retaliation Does Not Undermine Title VII.

In any event, the conclusion that § 1981 covers claims for retaliation presents no conflict between the two remedial schemes because "[s]ection 1981 is not coextensive in its coverage with Title VII." *Johnson*, 421 U.S. at 460. Section 1981 reaches a variety of claims that Title VII does not reach (and which might go unremedied without a retaliation claim under § 1981), such as claims against businesses with fewer than fifteen employees. *See Rivers*, 511 U.S. at 304 n.3 ("Even in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, *see* 42 U.S.C. § 2000e(b), whereas § 1981 has no such limitation."). Indeed, in 1990, a Senate report noted that § 1981 is "the only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees." H.R. Rep. No. 101-315, at 12 (1990).

Moreover, while Title VII covers discrimination and retaliation only in the context of employment, 42 U.S.C. §§ 2000e-2(a) & 2000e-3(a), § 1981 covers discrimination and retaliation in the context of *all* contracts. 42 U.S.C § 1981(a), (b); *see also Rivers*, 511 U.S. at 304 (noting that because § 1981 "covers all contracts," a "substantial part" of its sweep "does not overlap Title VII").

Because Title VII is limited to discrimination in employment, it affords no protection from retaliation

against independent contractors, *see, e.g., Danco Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 13 (1st Cir. 1999), and a reading of § 1981 that forecloses claims for retaliation in this context would accordingly leave such persons without a federal remedy if they suffer reprisal as a result of complaining about race discrimination. In other areas, such as the First Amendment context, the Court has recognized the need to protect independent contractors — like employees — from retaliation. Even though the text of the First Amendment contains no mention of the word "retaliation," this Court has not only extended its protections to public employees who suffer retaliation for the exercise of their free speech rights, *see Perry v. Sindermann*, 408 U.S. 593, 597 (1972), but also to independent contractors who provide services or goods to the government and who likewise suffer such retaliation. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (failure to afford such protections to independent government contractors would leave their rights "unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services").

Amici's argument that Title VII should be an employee's exclusive remedy for retaliation because it affords the employer "prompt notice" of a potential claim (EEAC Amicus Br. at 18; Chamber of Commerce Amicus Br. at 24) amounts to a paradoxical proposition. When an employer fires an employee for notifying it of race discrimination, it can hardly maintain that it is entitled to prompt notice of a subsequent retaliation claim that is predicated on the very grievance that caused it to retaliate in the first place.

C. There is No Reason to Believe That Plaintiffs Will Bypass Title VII for § 1981.

Finally, the suggestion that upholding the lower court's conclusion will cause plaintiffs to bypass the strictures of Title VII, and that Title VII will be rendered a nullity as a result, is implausible and not empirically supported. While petitioner notes statistics showing a rise in retaliation claims *under Title VII* over the last decade, it points to no evidence suggesting a significant rise in the filing of § 1981 claims alleging retaliation for complaints about race discrimination in the wake of decisions by the courts of appeals, including the Seventh Circuit, concluding that such claims are cognizable under § 1981. *See* Pet. Br. at 39; *see also* Chamber of Commerce Amicus Br. at 23.

In fact, there is no reason to anticipate that this Court's confirmation of a right to seek redress for retaliation under § 1981 would render Title VII redundant, because there are important advantages to the employee of Title VII's administrative apparatus. For example, the employee many benefit from an investigation conducted by the Equal Employment Opportunity Commission, which — armed with broad investigative powers, including the power to issue subpoenas, *see* 42 U.S.C. § 2000e-9 — may unearth evidence the employee would never otherwise uncover. That is especially so if the employee is proceeding pro se, as was respondent at the outset of this litigation. The employee may also benefit from the Commission's decision to commence a civil proceeding itself against the employer, *see* 42 U.S.C. § 2000e-5(f)(1). Moreover, the employee may assert a Title VII claim on multiple

grounds in addition to race, including, "color, religion, sex, or national origin," 42 U.S.C. § 2000e-2. Given these benefits, in many situations, "the administrative route may be highly preferred over the litigatory [one]." *Johnson*, 421 U.S. at 461.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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